

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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May 3, 2004

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GSBCA 16250-RATE

In the Matter of INTERSTATE VAN LINES, INC.

Alan F. Wohlstetter and Stanley I. Goldman of Denning & Wohlstetter, Washington, DC, appearing for Claimant.

James F. Fitzgerald, Director, Audit Division, Office of Transportation and Property Management, Federal Supply Service; and Robert Hoff, Office of General Counsel, General Services Administration, Washington, DC, appearing for General Services Administration.

Col. John B. Hoffman, Staff Judge Advocate, Headquarters, Surface Deployment and Distribution Command, Department of the Army, Alexandria, VA, appearing for Department of Defense.

**BORWICK**, Board Judge.

In this matter the General Services Administration's (GSA's) Audit Division ordered the Department of Defense (DoD) to withhold \$42,718.63 from funds due Interstate Van Lines (INVA) to satisfy the debts of carriers Snow Moving and Storage (SMSO) and Blue Ribbon Van & Storage (BRQV) arising from the alleged overcharges of those carriers. INVA sought Board review of GSA's withholding order.

The Government was not in privity of contract with INVA, but was in privity with SMSO and BRQV through government bills of lading (GBLs). The Government has not established that SMSO and BRQV were actually INVA by another name. To the contrary, it appears more likely than not that with respect to the GBLs at issue here, SMSO and BRQV were not the agents of INVA; rather, INVA was the agent of SMSO and BRQV. SMSO and BRQV, and not INVA, are consequently responsible for the alleged overcharges. We therefore reverse GSA's action.

## Background

The GBLs in question were for single line-haul rate shipments of household goods (HHG), and were issued by DoD to the carriers, SMSO and BRQV. The Government paid SMSO and BRQV for the services covered by the GBLs.

INVA had entered into arrangements with both SMSO and BRQV for common administrative control of HHG shipments. Under the memorandum of understanding with BRQV, INVA would perform all traffic management, claims handling and settlement, and invoicing and revenue distribution, and would file all rate tenders on behalf of BRQV. BRQV would perform all traffic management, claims handling, invoicing, and revenue distribution only on traffic booked, packed, and hauled by BRQV itself. INVA, at its discretion, would file rate tenders and letters of intent at military installations. Of gross line-haul revenue on all shipments booked by INVA on behalf of BRQV, BRQV retained two percent. Finally, INVA would designate persons to perform and sign necessary documents on behalf of BRQV. INVA entered into a similar memorandum of understanding with SMSO, except that as consideration, INVA prepaid \$5000 for use of SMSO's carrier authority. From a review of the agreements, it appears that they were the subject of negotiation between INVA and the officers of SMSO and BRQV.

INVA's executive vice president explains that INVA and other HHG carriers participating in the Military Traffic Management Command (MTMC) personal property program regularly haul shipments for other carriers.<sup>1</sup> The executive vice president explains the practice, known as "interlining at origin," is common in the industry and is used to maximize vehicle capacity. Such shipments are transported at the GBL's carrier rate to the Government and under the tender of service of the carrier stated on the GBL. INVA's executive vice president considers INVA and other carriers which perform hauling services for a carrier stated in the GBL to be subcontractors to the carrier stated in the GBL.

On January 10, 1997, SMSO submitted to the MTMC a tender of service signature sheet in which SMSO declared itself in common administrative control with INVA as well as with five other firms for domestic shipments. INVA's executive vice president explains that INVA has never had any financial interest in SMSO, and that the president of INVA was a signatory on a tender of service sheet for SMSO for the purpose of authorizing him to sign documents on behalf of SMSO. A document in the record shows that BRQV has such arrangement with several carriers in addition to INVA.

GSA concedes that the arrangements that SMSO and BRQV made with INVA were allowed by MTMC rules for domestic shipments of household goods.

On or about March 25, 2003, SMSO told GSA that it had reviewed a preliminary list of possible overcharges on SMSO's shipment of HHG and had determined that INVA "was operating under SMSO authority at one time." SMSO questioned its responsibility for any assessed overcharges for shipments that it considered INVA's responsibility. On March 27, 2003, SMSO advised GSA that it had reviewed GSA's listing and had determined "which overcharges belonged to SMSO and which belonged to INVA."

GSA says that it established that payments for transportation services were being forwarded to SMSO and BRQV at INVA's address in Virginia and that INVA was

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<sup>1</sup> The MTMC is now known as the Surface Deployment and Distribution Command. Since all parties refer to the MTMC in their submissions, for ease of reading we use MTMC as well.

responding to notices of overcharges issued to both transportation service providers. GSA concluded that there was common financial and administrative control or an agency relationship between SMSO or BRQV and INVA.

GSA says that on or about April 16, 2003, GSA requested the Defense Finance and Accounting Service (DFAS) to withhold \$200,000 from amounts otherwise due INVA to satisfy the debts owed by SMSO and BRQV.

On May 12, 2003, GSA issued notices of overcharges to SMSO and to BRQV concerning shipments under GBLs to those respective carriers.

On or about May 20, 2003, GSA met with officers of INVA to identify shipments that were tendered to SMSO or BRQV but that were transported by INVA. GSA and INVA met again on July 2.

On July 14, 2003, the Director of GSA's Audit Division wrote INVA:

Thank you for meeting with me on July 2, 2003, concerning the General Services Administration's (GSA) efforts to collect excess transportation charges from Snow Moving and Storage (SMSO) and Blue Ribbon Van & Storage (BRQV).

GSA asked [the] Defense Finance and Accounting Service (DFAS), Indianapolis, [Indiana], to initiate setoff procedure[s] to collect \$200,000 from payments due Interstate Van Lines (INVA). The basis for this request was that SMSO had advised that you provided line[-]haul services for several of the shipments on which Notices of Overcharges had been issued. Upon further investigation, GSA discovered that payments to SMSO and BRQV were forwarded to your address in Merrifield, Virginia. GSA concluded that there was an affiliation between you and the two companies.

You contend that your role is limited to providing billing and other transportation management services to SMSO and BRQV. However, in both instances, you have also admitted to providing line-haul services. You have not clearly defined the relationship between you and the subject carriers, nor have you provided any supportive documentation. Based on the evidence, including your actions, we conclude that you are liable for the debts of SMSO and BRQV.

GSA's determination is based on Comptroller General Decision B-181623 [(Aug. 5, 1975)], in which the Comptroller decided that 49 U.S.C. § 14706 applies to overpayments, in conformance with Atlantic Coast Line Rail Co. v. Smith Bros. Inc., 63 F.2d 747, 748 (5th Cir. 1933).

Consequently, GSA's position in this matter remains the same regarding your liability. GSA has applied \$42,718.63 to the debts of both carriers, and is refunding the balance of \$157,281.37 to INVA.

INVA appealed that determination to the Board.

### Discussion

GSA argues that INVA is jointly and severally liable with SMSO and BRQV for SMSO's and BRQV's alleged overcharges. The Government argues that INVA's liability is established by statute, 49 U.S.C. § 14706 (2000), popularly known as the Carmack Amendment to the Interstate Commerce Commission Act, and that INVA's liability is confirmed by Merchants Fast Motor Lines, Inc., B-181623 (Aug. 5, 1975). GSA also argues that the Comptroller General's decision is consistent with a court decision that holds that 41 U.S.C. § 14706 is not limited to situations involving loss or damage to property--Atlantic Coast Line R.R. v. Smith Bros. Inc., 63 F.2d 747 (5th Cir. 1933).

INVA argues that the Government has misread 41 U.S.C. § 14706. INVA argues that the statute places joint and several liability only for the loss or damage to property. INVA notes that the Government seeks to recover by set-off for overcharges on SMSO's shipments, and that loss or damage to property is not at issue. INVA notes that the Atlantic Coast Line case did not construe the Carmack Amendment, but provisions of the Interstate Commerce Commission Act that make participating carriers liable for unreasonable joint through rates. INVA notes that the GBLs here were for single-line rates with individual carriers, either SMSO or BRQV.

INVA argues that the set-off of \$42,718.63 was improper because INVA is not liable for the debts of SMSO or BRQV. INVA maintains that for the allegedly overcharged shipments, it acted as a subcontractor to SMSO and BRQV, and that the Government lacks privity of contract with INVA.

A GBL is a contract between the Government and a carrier, here between the Government and SMSO or BRQV. Dalton v. Sherwood Van Lines Inc., 50 F.3d 1014, 1015 (Fed. Cir. 1995); Intercoastal Xpress Inc., GSBCA 14576-RATE, 99-1 BCA ¶ 30,370 (relationship between Government and carrier wholly contractual). As such, the GBL establishes privity between the carrier and the Government. Regardless of SMSO's or BRQV's use of INVA as its agent to perform the services, if SMSO and BRQV were independent entities from INVA, only SMSO and BRQV are responsible for overcharges. Cf. Interstate Van Lines Inc., B-194029 (June 18, 1979) (As named party on GBL, carrier responsible for billing and receiving payment. Carrier may not limit its liability for overpayment to instances where billing for storage services tendered directly to carrier.)

In one case reviewed by the General Accounting Office (GAO), DoD entered into a contract with Roadair Feeder Service, an authorized shipper's agent. Roadair then subcontracted with Trism Specialized Carriers, but failed to pay Trism. Trism sought recovery against the Government, but GAO held that Trism had no recourse against the Government, since, among other reasons, Trism was not a party to the GBL.<sup>2</sup> Trism

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<sup>2</sup> GAO also held that Roadair was not acting as the Government's agent in contracting with Trism since Roadair did not act under the Government's instruction when it made the separate arrangement with Trism.

Specialized Carriers, B-260604 (Apr. 18, 1996). Similarly, a warehouseman not in privity with the Government through a GBL may not recover against the Government even though the warehouseman performed services as a subcontractor for the bankrupt line-haul carrier that was a party to the GBL. Universal Storage Warehouses, 43 Comp. Gen. 290 (1963).

Here, the Government was not in privity with INVA; it was in privity with SMSO and BRQV. INVA was not a party to the GBLs. Instead, SMSO and BRQV entered into subcontracting arrangements with INVA, as the Government concedes they were allowed to do under MTMC regulations. GSA stated in its submission to the Board that GSA paid SMSO and BRQV directly and has no knowledge of the revenue distribution agreement between SMSO, BRQV, and INVA.

The wall of privity might not matter if there were evidence that BRQV or SMSO was really INVA. The record does not establish GSA's contention that either SMSO or BRQV were corporate subsidiaries of INVA, or that SMSO or BRQV was INVA by another name. GSA did not rebut the affidavit of INVA's executive vice president that INVA had no financial interest in SMSO. From the tender of service sheet filed by BRQV, it is evident that BRQV had entered into common administrative control arrangements with a number of moving firms. GSA has not shown that the tender of service agreement between BRQV and INVA is proof that BRQV is really INVA. The service agreements between INVA and SMSO and INVA and BRQV appear to be agreements arrived at by independent entities after negotiations. In fact, under the arrangements INVA made with SMSO and BRQV, INVA was the agent and SMSO and BRQV were the principals.

The statutes and cases relied upon by GSA for INVA's liability do not help the agency's case. 49 U.S.C. § 14706 provides in pertinent part:

A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation and service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose lines or routes the property is transported in the United States.

49 U.S.C. § 14706(a). The purpose of the Carmack Amendment is to pre-empt a shipper's common law or state law claims against carriers for loss or damage to property and subject such claims to the exclusive federal statutory remedy. Hughes v. United Van Lines, 829 F.2d 1407, 1412-14 (7th Cir. 1987), cert. denied, 485 U.S. 913 (1988); Nichols v. Mayflower Transit, LLC, No. CV-S-03-0273-JCM, 2003 WL 21981994, at 3-4 (D. Nev. June 19, 2003). The Government does not claim loss or damage to property here.

The Atlantic Coast Line case and Merchants Fast Motor Line do not help GSA either. Atlantic Coast Line applied an Interstate Commerce Commission (ICC) rule that when the

ICC finds a joint through rate unreasonable a reparation order runs collectively against the carriers that participated in the transportation. Atlantic Coast Line, 63 F.2d at 748. Merchants Fast Motor Lines restates that rule. Here, joint through rates were not involved. The GBLs were for single line haul rate shipments.

The statutes at 49 U.S.C. §§ 13907 and 14911 make corporations liable for the acts of their employees, officers, and agents; the statutes do not change the relationship of INVA to SMSO or to BRQV. To the contrary, those statutes support the proposition that SMSO and BRQV would be liable if INVA's actions resulted in the alleged overcharges.

The Board reverses the action of GSA's Audit Division in ordering withholding of \$42,718.63 against INVA.

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ANTHONY S. BORWICK  
Board Judge